

**Commonwealth of Kentucky  
Workers' Compensation Board**

**OPINION ENTERED: June 8, 2018**

CLAIM NO. 201301439

TYSON FOODS, INC.

PETITIONER

VS.

**APPEAL FROM HON. STEPHANIE L. KINNEY,  
ADMINISTRATIVE LAW JUDGE**

SIXTA CARMONA AND  
HON. STEPHANIE L. KINNEY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**ALVEY, Chairman.** Tyson Foods ("Tyson") appeals from the September 18, 2017 Opinion, Award, and Order, and the February 19, 2018 Order on petition for reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ determined Sixta Carmona ("Carmona") sustained work-

related injuries to her upper extremities on January 19, 2012, and awarded temporary total disability ("TTD") benefits from May 23, 2013 through March 8, 2017, permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Tyson argues the ALJ erred in awarding TTD benefits through March 8, 2017, since the medical evidence demonstrates Carmona reached maximum medical improvement ("MMI") on either April 4, 2012, March 11, 2013 or December 17, 2013. Tyson also argues the award of PPD benefits constitutes a gross injustice. We vacate in part and remand to the ALJ for additional findings addressing when Carmona reached MMI from her January 19, 2012 work injury. Because the opinion of Dr. Jules Barefoot constitutes substantial evidence, we affirm the ALJ's award of PPD benefits based upon a 34% impairment rating.

Carmona filed a Form 101 on September 23, 2013 alleging she developed bilateral upper extremity pain from January 19, 2012 through January 23, 2012. She alleged bilateral upper extremity injuries on January 19, 2012 while attempting to catch a pack of twenty-five boxes. Carmona alleged a right upper extremity injury on January 5, 2013 when she collided into a door. Carmona alleged an injury to her left elbow on February 25, 2013 when a maintenance worker struck her left arm with a stainless steel step. The claim

was assigned to Hon. Robert L. Swisher, former Administrative Law Judge, ("ALJ Swisher") and subsequently re-assigned to the ALJ.

Carmona testified she worked for Tyson in the chicken processing plant from September 12, 2011 to May 23, 2013 on the production line and in the box room. Carmona indicated that prior to January 2011, she never experienced symptoms in either hand, wrist or arm. Carmona does not believe she can return to her former job with Tyson due to her bilateral upper extremity condition.

The medical evidence indicates Carmona was previously assigned permanent restrictions based upon Tyson's August 24, 2011 pre-employment physical. Apparently, a nerve conduction study demonstrated abnormal results. Carmona was restricted from live catching and hanging, pulling skins or tenders, use of vibratory tools, and she was limited to knife or scissor use upon commencement of her employment with Tyson.

Carmona first sought treatment for her January 19, 2012 injury at WorkHealth with Alicia Terry, PA-C, who treated her conservatively with medication and physical therapy.

Carmona regularly treated with Dr. Casie Mosley, her primary care physician, and Dr. Judith Canlas for her bilateral upper extremity condition. Carmona began treating with Dr. Mosley in August 2012, and consistently complained

of bilateral hand and wrist symptoms. Dr. Mosley treated Carmona conservatively with medication, wrist splints, and physical therapy. She also referred Carmona to Dr. Canlas, who began treating her in April 23, 2013. Dr. Canlas noted Carmona reported work-related injuries on January 19, 2012 and January 4, 2013 resulting in pain in her bilateral shoulders, elbows, and wrists, as well as numbness and tingling in her hands. Among other treatment, Dr. Canlas ordered an EMG/NCV study for suspected carpal tunnel syndrome. The April 25, 2013 study findings were consistent with bilateral carpal tunnel syndrome and left cubital tunnel syndrome. Thereafter, Dr. Canlas diagnosed Carmona with bilateral carpal tunnel syndrome and referred her to a hand surgeon. Similarly, Dr. Mosley provided the identical diagnoses and repeatedly referred her to a hand surgeon from June 2013 to April 2014.

Carmona also treated with Dr. Jacob O'Neill on April 4, 2012, who diagnosed complaints of bilateral wrist and hand pain, and non-work-related osteoarthritic changes in the joints of her left thumb and right index finger. He noted Carmona's multiple subjective complaints did not correspond to the objective findings on examination. He opined Carmona had attained MMI and required no further treatment. He found Carmona's injury did not warrant a permanent impairment

rating pursuant to the 6<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Carmona treated with Dr. J. Criss Yelton on March 11, 2013. Dr. Yelton noted the January 2013 incident where a door hit Carmona on the right forearm. Dr. Yelton diagnosed a right forearm contusion and predicted a complete recovery. Dr. Yelton noted Carmona's symptoms are inconsistent with the clinical findings.

Carmona filed Dr. Barefoot's December 17, 2013 report. He diagnosed bilateral median nerve neuropathy and left ulnar nerve neuropathy confirmed by the April 25, 2013 electro-diagnostic studies. Pursuant to the 5<sup>th</sup> Edition of the AMA Guides, Dr. Barefoot assessed a 16% impairment for the right upper extremity and a 23% impairment rating for the left upper extremity, for a combined 34% impairment rating. Dr. Barefoot apportioned 100% of the impairment rating to Carmona's work injuries. Dr. Barefoot recommended a referral to a hand surgeon for evaluation for possible surgical intervention and noted she will need ongoing treatment for her condition. Dr. Barefoot also assigned restrictions. Dr. Barefoot did not specifically address MMI in his report.

In a May 20, 2014 addendum, Dr. Barefoot disagreed with the opinions of Dr. Jeanna Lee. He also opined that

although Carmona had abnormal pre-employment nerve conduction studies, she was asymptomatic when she began working for Tyson, but the condition was dormant and non-disabling. Dr. Barefoot opined her workplace activities aroused her condition into a symptomatic and disabling state.

Tyson filed Dr. Lee's May 13, 2014 report, and she also testified by deposition on June 13, 2014. Dr. Lee opined Carmona most likely sustained some minor strains and contusions due to her work-related injuries. Dr. Lee opined Carmona's current bilateral upper extremity complaints are unrelated to any work accidents. Dr. Lee found Carmona's subjective complaints did not correspond to objective findings on examination. Dr. Lee opined Carmona reached MMI for each work injury within a few weeks after each specific incident. She found Carmona did not qualify for a permanent impairment rating and required no future medical treatment for her work-related injuries. Dr. Lee opined Carmona's bilateral carpal tunnel syndrome and ulnar neuropathy are unrelated to her work activities with Tyson.

ALJ Swisher entered an interlocutory order on September 8, 2014. He found Carmona sustained a work-related injury to her upper extremities on January 19, 2012 and her repetitive work activities aggravated and exacerbated those injuries resulting in symptomatic bilateral carpal tunnel

syndrome and left cubital tunnel syndrome. ALJ Swisher also found Carmona was asymptomatic with respect to her bilateral upper extremities upon entering her employment with Tyson, and the January 19, 2012 incident, as well as her ongoing work activities, aroused a pre-existing dormant condition into disabling reality. Therefore, ALJ Swisher found Carmona's bilateral carpal tunnel syndrome and left ulnar nerve cubital tunnel syndrome directly and causally related to the work injuries. ALJ Swisher relied upon Drs. Canlas, Mosley and Barefoot. ALJ Swisher additionally found the January 5, 2013 work accident resulted in only a right forearm contusion, which resolved and does not warrant an award of PPD or medical benefits.

ALJ Swisher found Carmona "has not reached [MMI] and is entitled to be referred to and evaluated by an orthopedic surgeon/hand specialist for a determination as to whether surgical intervention is appropriate." The ALJ found Carmona was entitled to TTD benefits beginning on May 23, 2013 and until such time she reached MMI or a level of improvement allowing her to return to her regular employment with Tyson. ALJ Swisher ordered Tyson to pre-authorize Carmona's referral to an orthopedic surgeon/hand specialist, awarded TTD benefits beginning on May 23, 2013, and placed the claim in abeyance.

The claim was re-assigned to the ALJ on January 5, 2015. Subsequently, Carmona suffered from a myocardial infarction on April 20, 2015, resulting in implantation of two stents, and a stroke in November 2015. Her cardiologist advised Carmona she would be unable to undergo any type of surgery for up to a year in a May 21, 2015 letter.

The claim was removed from abeyance on May 3, 2017. Carmona was evaluated by Dr. Scott Farner on August 5, 2016, who noted Carmona complained of bilateral hand numbness and tingling, and there was electrodiagnostic evidence of carpal tunnel syndrome and cubital tunnel syndrome. He also noted Carmona demonstrated severe symptom magnification. He opined Carmona, "is not likely to have a good result with surgery. I do not plan to intervene surgically in this patient." He referred Carmona to Dr. Tsu-Min Tsai, a physician in the same practice, for a second opinion. In an April 7, 2017 letter, Dr. Farner opined Carmona's symptoms did not arise from work and are the result of the normal aging process and/or other factors. In a February 22, 2017 letter, Dr. Tsai opined Carmona's cervical issues are unrelated to her hand injury or work.

Carmona filed Dr. Barefoot's report from an April 19, 2017 evaluation. He performed an examination and reviewed additional medical records. He confirmed his prior diagnoses



of bilateral median nerve neuropathy and left ulnar nerve neuropathy, and reiterated his opinion as to causation. Dr. Barefoot again assessed a 34% impairment rating. He noted his agreement with the hand surgeon's opinion that Carmona is a poor surgical candidate. Dr. Barefoot did not specifically address MMI in the April 19, 2017 report.

Tyson submitted Dr. Thomas Gabriel's February 6, 2017 report. He also testified by deposition on May 16, 2017. He opined the January 19, 2012 and January 2013 work accidents resulted in a strain or contusion and are not the cause of her current subjective complaints of numbness and tingling. He opined Carmona's nerve compression is pre-existing and chronic, and was neither aggravated nor accelerated by her short employment with Tyson. He noted Carmona's subjective complaints outweighed the clinical exam or diagnostic finding. He also diagnosed Carmona with chronic pain, chronic bilateral carpal tunnel syndrome, and bilateral thumb CMC arthritis, unrelated to the January 19, 2012 work injury. For the January 19, 2012 injury, Dr. Gabriel opined Carmona reached MMI on April 4, 2012. For the January 2013 injury, Dr. Gabriel opined Carmona reached MMI on March 11, 2013. Dr. Gabriel found Carmona's work injuries warranted no impairment rating and no further treatment.

A benefit review conference ("BRC") was held May 3, 2017. The parties stipulated Carmona sustained an alleged/disputed work injury on January 19, 2012. The BRC order reflects Tyson paid TTD benefits at the rate of \$257.58 per week from May 23, 2013 through March 8, 2017 for a total of \$52,608.22, as well as medical expenses totaling \$8,336.15. This stipulation was later amended to reflect Tyson paid TTD benefits through June 14, 2017 for a total of \$54,606.96. The parties identified the following contested issues: benefits per KRS 342.730, including permanent total disability and multipliers; work-relatedness/causation; injury as defined by the Act; TTD, including overpayment and duration; and future medicals.

In the September 18, 2017 opinion, the ALJ re-examined the issue of work-relatedness and causation. She reviewed the findings made by ALJ Swisher in the September 8, 2014 interlocutory opinion, as well as additional evidence submitted since that time. The ALJ declined to disturb ALJ Swisher's finding Carmona sustained a work-related injury to her upper extremities on January 19, 2012, relying upon Drs. Mosley, Canlas, and Barefoot.

In analyzing Carmona's entitlement to TTD benefits, the ALJ first reviewed the cases of Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004); W.L. Harper

Construction Co. v. Baker, 858 S.W.2d 202 (Ky. App. 1993);  
Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000);  
Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) and  
Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016).

The ALJ provided the following analysis:

The Defendant has paid [TTD] benefits at the rate of \$257.58/week from May 23, 2013 through March 8, 2017, as stipulated at the Benefit Review Conference on May 3, 2017. The Defendant asserts there has been an overpayment of temporary total disability benefits as to rate. The Defendant argues Plaintiff reached MMI on April 4, 2012, relying on Dr. Gabriel. This ALJ, however, does not believe Plaintiff reached MMI prior to an evaluation with a hand surgeon to determine if surgery was indicated. Thus, this ALJ is not persuaded by the Defendant's arguments on this issue. Therefore, Plaintiff is awarded temporary total disability benefits at the rate of \$257.58/week from May 23, 2013 through March 8, 2017.

The ALJ next found Carmona retains a 34% impairment rating due to the work injury, relying upon Dr. Barefoot and the presence of objective diagnostic testing, surgical recommendations and ongoing restrictions. The ALJ found Carmona is also entitled to the three multiplier. The ALJ found Carmona is not permanently and totally disabled, and therefore awarded TTD benefits from May 23, 2013 through March 8, 2017, PPD benefits, and medical expenses.

Tyson filed a petition for reconsideration asserting the ALJ erred in awarding TTD benefits through March 8, 2017 since she attained MMI on either April 4, 2012, March 11, 2013 or December 17, 2013. Tyson argued the ALJ erred in stating she was, "not inclined to find Carmona has no permanent impairment rating based on objective diagnostic testing findings, surgical recommendations and ongoing restrictions." Tyson also argued the ALJ mistakenly awarded TTD and PPD benefits to be paid during the same timeframe, May 23, 2013 through March 8, 2017.

In the February 19, 2018 order on reconsideration, the ALJ made the following additional findings regarding TTD benefits:

The Defendant argues the only hand surgeon that examined Plaintiff was Dr. Thomas Gabriel, who examined Plaintiff on February 6, 2017. Dr. Gabriel placed Plaintiff at maximum medical improvement on April 4, 2012 for the first injury and March 11, 2013 for the second. The Defendant also notes Dr. Barefoot felt Plaintiff reached maximum medical improvement on December 17, 2013, upon his first evaluation.

This ALJ does not believe Plaintiff reached maximum medical improvement prior to the issuance of CALJ Swisher's interlocutory opinion of September 8, 2014. Chief ALJ Swisher found Plaintiff was not at maximum medical improvement and ordered the pre-authorization of a referral to a hand specialist/hand surgeon. Plaintiff sought treatment with

multiple hand specialists and was ultimately determined to be a poor surgical candidate. Considering Plaintiff's treatment following the interlocutory opinion and consultations with Drs. Farner and Tsai, this ALJ is simply not inclined to find Plaintiff reached maximum medical improvement prior to September 8, 2014, the date of the interlocutory opinion. Thus, this ALJ rejects Dr. Gabriel's proposed date of maximum medical improvement and finds Plaintiff is entitled to temporary total disability benefits from May 23, 2013 through March 8, 2017 at the rate of \$257.58/week.

Recognizing no physician has formally recommended surgery, the ALJ stated she was still not inclined to find Carmona retains no permanent impairment rating due to the work injury since her diagnostic studies evidence a significant upper extremity condition, her restrictions prevent her from returning to her pre-injury job duties, and numerous physicians indicated a referral to a hand surgeon was necessary. The ALJ stated she was unpersuaded by the opinions of Drs. Farner and Tsai since they did not render treatment until "many, many months after her symptoms manifested." The ALJ also clarified the award of benefits to reflect the award of PPD benefits shall be suspended during any period of TTD benefits.

On appeal, Tyson argues the ALJ erred in awarding TTD benefits through March 8, 2017, since the medical evidence

demonstrates Carmona reached MMI prior to that date. It asserts there are only three potential dates of MMI provided by the medical evidence that the ALJ could have relied upon: 1) Dr. Gabriel determined Carmona reached MMI from the first injury on April 4, 2012; 2) Dr. Gabriel determined Carmona reached MMI from the second injury on March 11, 2013; and 3) Dr. Barefoot indicated Carmona reached MMI at the time of his first examination, December 17, 2013. Rather than adopting one of the three dates above, Tyson asserts the ALJ erroneously substituted it with her own judgement to arrive at an arbitrary date of March 8, 2017.

Tyson also argues the award of PPD benefits constitutes a gross injustice on two grounds. It asserts it was fundamentally unfair to discredit the opinions of Drs. Farner and Tsai as being too far removed from the date of injury. Tyson also asserts the ALJ was merely unpersuaded by its expert opinion and comported her reasoning to reach that conclusion.

As the claimant in a workers' compensation proceeding, Carmona had the burden of proving each of the essential elements of her cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was successful in her burden, the questions on appeal are whether the ALJ performed the proper analysis, and

whether substantial evidence of record supports the decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative

value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We first note substantial evidence supports the ALJ's determination Carmona sustained a work-related injury to her upper extremities on January 19, 2012. Although it does not appear that Tyson appeals the ALJ's determination regarding causation/work-relatedness, we nevertheless determine the ALJ acted well within her discretion in relying upon Drs. Mosley, Canlas, and Barefoot in reaching her determination which will not be disturbed on appeal.

With that said, we vacate in part and remand for the ALJ to determine when Carmona attained MMI from her work injury. KRS 342.0011(11)(a) defines TTD as follows:



'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

*TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined. (emphasis added)*

Section 2.4 of the AMA Guides directs as follows:

2.4 When Are Impairment Ratings Performed?

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some

expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living. (original emphasis)

The ALJ awarded TTD benefits through March 8, 2017, presumably the date Tyson ceased voluntarily paying TTD benefits as stipulated at the May 3, 2017 BRC. The ALJ did not make a specific finding regarding when Carmona reached MMI. Rather, the ALJ only determined Carmona did not reach MMI prior to an evaluation with a hand surgeon to determine if surgery was indicated. Similarly, in the order on reconsideration, the ALJ found Carmona did not reach MMI prior to the September 8, 2014 interlocutory order, and therefore rejected Dr. Gabriel's proposed date of MMI. The ALJ again found Carmona entitled to TTD benefits from May 23, 2013 through March 8, 2017. In both the opinion and order on reconsideration, the ALJ failed to make a specific finding of when Carmona reached MMI from her January 19, 2012 work injury. She merely determined that MMI was not reached prior to the interlocutory opinion. The cessation of voluntary payment of TTD benefits by an Employer does not automatically establish MMI. Therefore, we vacate the award of TTD benefits and remand the claim to the ALJ with directions to determine,

based upon the medical evidence, when Carmona reached MMI from her January 19, 2012 work-related injury and award TTD benefits accordingly. We direct no particular result, and decline to limit the ALJ's analysis to the three potential dates as argued by Tyson.

Regarding Tyson's second argument, we find substantial evidence supports the ALJ's determination Carmona's work injury warrants a 34% impairment rating based upon the opinions of Dr. Barefoot. On appeal, Tyson does not argue the opinions of Dr. Barefoot are deficient or unsubstantial. If "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). In his December 17, 2013 report, Dr. Barefoot diagnosed Carmona with bilateral median nerve neuropathy and left ulnar nerve neuropathy, and assessed a 34% impairment rating pursuant to the 5<sup>th</sup> Edition of the AMA Guides. He also recommended a referral to a hand surgeon for evaluation for possible surgical intervention. In his second report dated April 19, 2017, Dr. Barefoot noted Carmona had been evaluated by a hand surgeon, and agreed she is a poor surgical candidate. He reaffirmed the diagnosis and 34% impairment rating,

attributing the entirety to her workplace activities at Tyson. Because substantial evidence supports the ALJ's determination Carmona's January 19, 2012 work injury warrants a 34% impairment rating, we affirm the award of PPD benefits.

Accordingly, the September 18, 2017 Opinion, Award, and Order, and the February 19, 2018 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are **AFFIRMED IN PART, VACATED IN PART** and **REMANDED** for additional findings and entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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